Zulkiflee bin Mohd Dom v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-30-1996
AUGUSTINE PAUL JC
18 DECEMBER 1996

Criminal Procedure *— Charge — Defective charge — Failure to particularize cheating in a cheating charge — Whether such failure would result in the charge being defective — Whether accused was misled by such failure — Effect of ss 154 and 156 of the Criminal Procedure Code (FMS Cap 6) — Criminal Procedure Code (FMS Cap 6) ss 154 & 156*

Criminal Procedure *— Charge — Framing or particulars of — Failure to particularize cheating in a cheating charge — Whether such failure would result in the charge being defective — Whether accused was misled by such failure — Effect of ss 154 and 156 of the Criminal Procedure Code (FMS Cap 6) — Criminal Procedure Code (FMS Cap 6) ss 154 & 156*

The accused was charged under s 420 of the Penal Code (FMS Cap 45) ('the Code') for the offence of cheating and he claimed trial. The particulars of the deception practised on the complainant were not set out in the charge. At the conclusion of the trial, the magistrate found the accused guilty and accordingly convicted him. The accused appealed against both the conviction and sentence. One of the issues which arose for determination concerned the legality of the charge. The need to state the particulars of the manner in which the alleged offence was committed is prescribed by s 154 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). Among the issues for consideration were (i) whether the failure to particularize the deception in the charge under s 420 of the Code was fatal; and (ii) the effect of both ss 154 and 156 of the CPC.

Held, allowing the appeal and acquitting the accused:

(1) On the facts of the case, the conviction of the accused could not be sustained as the prosecution evidence did not support a charge for cheating (see p 164D).

(2) An analytical reading of both ss 154 and 156 of the CPC would reveal that they were in harmony with each other. Section 154 was a general provision while s 156 served to qualify it (see p 167D). Section 154 of the CPC would render a charge defective if an objection to its non-compliance was taken before the commencement of the trial with the appropriate amendments, while s 156 would not invalidate such a charge if the objection was taken during or at the conclusion of the trial in the circumstances mentioned in the section (see p 167E–G); *Tan Peng Ann v PP* [1949] MLJ Supp 10 and *Wong Siak Fon v PP* [1972] 1 MLJ 203 distinguished; *Liew Min Poh v PP* (1962) 3 MC 316 not followed.

(3) The object of s 154 of the CPC was firstly, to ensure that the accused had sufficient notice of the matter with which he was charged as otherwise he would be seriously prejudiced in his defence and secondly, to enable the court to keep in view the real points in issue and to confine the evidence to such matters (see p 167F–G).

(4) Section 156 of the CPC stated in unmistakable terms that if the accused had not been misled, an error or omission to state the offence or the particulars required should not be regarded as material. In this case there was nothing to suggest that the accused had been misled. In the circumstances, the omission to set out the particulars of the deception in the charge could not be said to be material so as to warrant a ruling that the charge was defective. The defects in the charge ought to have been rectified by the trial court (see pp 168G–169C); *Billinghurst & Ors v King Emperor* AIR 1924 Cal 18 and *Damodaran v The State* AIR 1953 SC 462 followed.

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 420 Kanun Keseksaan ('Kanun tersebut') untuk kesalahan menipu dan dia telah menuntut perbicaraan. Butir-butir penipuan yang dilakukan ke atas pengadu telah tidak disenaraikan dalam pertuduhan. Di akhir perbicaraan, majistret telah mendapati tertuduh bersalah dan seterusnya sabit kesalahannya. Tertuduh merayu terhadap kedua-dua sabitan dan hukuman. Salah satu daripada isu untuk diputuskan adalah mengenai kesahan pertuduhan tersebut. Keperluan menyenaraikan butir-butir mengenai cara kesalahan tersebut dilakukan adalah dinyatakan dalam s 154 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Antara isu-isu untuk dipertimbangkan adalah (i) sama ada kegagalan untuk menyenaraikan butir-butir penipuan dalam pertuduhan di bawah s 420 Kanun tersebut membawa padah; dan (ii) kesan kedua-dua ss 154 dan 156 KAJ.

Diputuskan, membenarkan rayuan dan membebaskan tertuduh:

(1) Mengikut fakta kes ini, sabitan tertuduh tidak boleh dikekalkan kerana keterangan pihak pendakwa tidak menyokong satu pertuduhan menipu (lihat ms 164D).

(2) Suatu bacaan analitikal kedua-kedua ss 154 dan 156 KAJ menunjukkan bahawa ianya adalah tekal di antara satu sama lain. Seksyen 154 adalah peruntukan am dan s 156 adalah seksyen pembatasan (lihat ms 167D). Seksyen 154 KAJ akan menyebabkan suatu pertuduhan itu cacat jikalau bantahan terhadap ketidakpatuhannya dibuat sebelum bermulanya perbicaraan dengan pindaan yang wajar, dan s 156 tidak akan membuat pertuduhan itu tidak sah jikalau bantahan dibuat semasa ataupun di akhir perbicaraan dalam keadaan yang dinyatakan

dalam seksyen tersebut (lihat ms 167E–G); *Tan Peng Ann v PP* [1949] MLJ Supp 10 dan *Wong Siak Fon v PP* [1972] 1 MLJ 203 dibeza; *Liew Min Poh v PP* (1962) 3 MC 316 tidak diikut.

(3) Objektif s 154 KAJ adalah pertamanya, untuk memastikan bahawa tertuduh mempunyai notis yang mencukupi akan pertuduhan yang dihadapinya kerana jikalau tidak dia akan diprejudiskan dengan seirus dalam pembelaannya dan keduanya, untuk membolehkan mahkamah mengambil ingat isu-isu sebenarnya dan untuk menghadkan keterangan kepada perkara-perkara tersebut (lihat ms 167F–G).

(4) Seksyen 156 KAJ menyatakan dengan jelas bahawa jika tertuduh tidak diperdayakan, satu kesilapan atau kegagalan untuk menyatakan kesalahan atau butir-butir yang diperlukan tidak akan disifatkan sebagai material. Di dalam kes ini, tidak ada apa-apa yang menunjukkan bahawa tertuduh telah diperdayakan. Dalam keadaan ini, kegagalan untuk menyenaraikan butir-butir penipuan dalam pertuduhan adalah tidak material untuk menghasilkan keputusan bahawa pertuduhan tersebut adalah cacat. Kecacatan dalam pertuduhan tersebut sepatutnya dibetulkan oleh mahkamah perbicaraan (lihat ms 168G–169C); *Billinghurst & Ors v King Emperor* AIR 1924 Cal 18 dan *Damodaran v The State* AIR 1953 SC 462 diikut.]

Notes

For a case on the failure to particularize cheating in a cheating charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 686.

For cases on the framing of charges generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 725–815.

Cases referred to

Australian Alliance Assurance Co Ltd v A-G (1916) St R Qd 135 (refd)
Billinghurst & Ors v King Emperor AIR 1924 Cal 18 (folld)
Damodaran v The State AIR 1953 SC 462 (folld)
Lew Cheok Hin v R [1956] MLJ 131 (refd)
Liew Min Poh v PP (1962) 3 MC 316 (not folld)
Low Seng Wah v PP [1962] MLJ 107 (refd)
Mohamed Syedol Ariffin v Yeoh Ooi Gark (1916) 1 MC 165 (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 63 (refd)
Tan Peng Ann v PP [1949] MLJ Supp 10 (distd)
Wong Siak Fon v PP [1972] 1 MLJ 203 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 154, 156
Penal Code (FMS Cap 45) s 420

Avatar Singh (*Mohd Latip & Associates*) for the appellant.
Anslem Charles Fernandis (Deputy Public Prosecutor) for the Public Prosecutor.

Augustine Paul JC: The charge preferred against the accused in the Magistrate's Court at Melaka is as follows:

> Bahawa kamu di antara jam 9.15 malam, 7 Oktober 1990 hingga jam 2 pagi, 8 Oktober 1990 di dalam perjalanan dari Peringgit ke Felda Kemendor, di dalam Daerah Melaka Tengah, telah menipu Zainab bte Hashim KP: A0876313 dengan curangnya mendorong supaya menyerahkan wang tunai RM100 yang mana dia tidak akan berbuat demikian jika tidak diperdayakan dan dengan ini kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 420 Kanun Keseksaan.

The accused claimed trial to the charge. The case for the prosecution rested on the evidence of eight witnesses while the accused gave evidence himself and did not call any other witness. At the conclusion of the trial the learned magistrate, after having found the accused guilty, convicted him and imposed a sentence of six months' imprisonment and a fine of RM3,000 in default 15 months' imprisonment. The appeal by the accused is against the conviction and sentence.

During the hearing of the appeal before me several issues arose for determination. Having scrutinized the facts of the case I was satisfied that the conviction of the accused could not be sustained as the prosecution evidence did not support a charge for cheating. Thus it was not necessary for me to make a ruling on all the issues raised except for one other matter concerning the legality of the charge which I shall consider after having dealt with the factual basis of the charge.

The allegation against the accused was that he had claimed to be a policeman and had said that he could settle the khalwat offence against the complainant in respect of which she had been caught in return for a payment of RM100. The sum was paid. No action was taken against her for khalwat. However, no evidence was adduced by the prosecution to show that the accused was not a policeman. Neither was any evidence adduced to show that the complainant being ultimately not charged for khalwat was not the result of any effort of representation made by him. On the contrary the prosecution evidence disclosed that action may not be taken against a couple caught for a khalwat offence if they subsequently got married. That was precisely what the accused arranged for the complainant. He took active steps to get her married to the man with whom she had committed khalwat within a month after the incident. To that extent and in the light of that part of the prosecution's evidence that I have adverted to, the accused had, as promised by him, settled the khalwat offence and there was therefore no element of cheating in his conduct within the meaning of s 420 of the Penal Code ('the Code').

I shall now deal with the legality of the charge preferred against the accused. The particulars of the deception practised on the complainant have not been set out in it. The Criminal Procedure Code (FMS Cap 6) ('the CPC') deals with this requirement. The need to state the particulars of the manner in which an alleged offence was committed is prescribed by s 154 of the Code which reads as follows:

A 154 When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

B The section contains, as do the other sections of the CPC, illustrations on its operation. I interpolate to add that illustrations serve as useful guides in the interpretation of a section and should not be lightly ignored. In this regard Lord Shaw of Dunfermline said in *Mohamed Syedol Ariffin v Yeoh Ooi Gark* (1916) 1 MC 165 at p 169:

C ... It is the duty of a court of law to accept, if that can be done, the illustrations in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such D assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the legislature as helpful in the working and application of the statute, should not be thus impaired.

Illustration (b) of the section is relevant for the purposes of the appeal E before me and is in the following terms:

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

Thus s 154 of the CPC as explained by illustration (b) makes it clear that in a charge for cheating the manner in which a complainant was cheated F must be set out in the charge. The effect of this section insofar as a charge for cheating is concerned has been considered in several cases. On the need to particularize the deception practised in the charge, Thomson J (as he then was) said in *Tan Peng Ann v PP* [1949] MLJ Supp 10 at pp 11–12:

G In each charge there is an allegation that the appellant cheated the complainant by dishonestly inducing him to deliver a sum of money for the purpose of obtaining the release of certain persons from lawful custody. It is not, however, every form of dishonestly inducing a person to deliver property that amounts to cheating, but only those forms of it in which the dishonesty consists in deceiving of a person concerned. In the charges here, H no particulars are alleged of the way in which the appellant deceived the complainants. In this connection, I would quote the following passage from the judgment of Beckett J in the Indian case of *Kanwan Sain v The Crown* 1938 1 LR 19 Lah 662.

'While the prosecution's evidence provides sufficient material for the framing of a charge of cheating, the charge itself has not been properly I drafted. In framing such a charge it is necessary to set out not merely the fact that the accused had obtained goods by dishonest means, but also the deception which has been practised ... The charge framed in the trial court merely states that the accused cheated the complainant

by dishonestly inducing him to deliver certain property, but it does not even indicate the nature of the representations by which the complainant was induced to make over the goods. It is necessary that the representation should be mentioned in the charge, so that the accused may have an opportunity of saying either that he never made such representation, or that the representation was not in fact false, or that it was not in consequence of this representation that the goods were obtained.'

On the effect of a failure to particularize the deception in the charge, Lee Hun Hoe J (as he then was) said in *Wong Siak Fon v PP* [1972] 1 MLJ 203 at p 205:

> In a cheating charge it is necessary to particularize the deception. I pointed this out in the case of *Hwong Tiong Cheong v PP* (Kota Kinabalu High Court Criminal Appeal No 12 of 1966 — unreported) when I allowed an appeal in a cheating case under s 417 of the Sabah Penal Code. I stated that the forms of charges set out in various editions of *Ratanlal's Law of Crimes* merely serve as a general guide and bear no relation to any particular set of facts. The charge must be so framed to enable an accused person to know with certainty what case he has to meet. I also referred to *Liew Min Poh v PP* (1962) 3 MC 316 where Azmi J (as he then was) held that in a charge under s 420 of the Penal Code it was necessary to set out not only the fact that the appellant had obtained goods by dishonest means but also the deceptions which had been practised for otherwise the charge was illegal amounting to a nullity.

In his well-reasoned submission the learned deputy public prosecutor contended that the failure to particularize the deception in a charge under s 420 of the PC is not fatal in all cases and, in support of his argument, referred to s 156 of the CPC which reads as follows:

> 156 No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

Illustrations (b) and (c) to the section specifically deal with a charge for cheating and are in the following terms:

> (b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The court may infer from this that the omission to set out the manner of the cheating is not material.
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> (c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The court may infer from such facts that the omission to set out the manner of the cheating was in this case, a material error.

The language of ss 154 and 156 of the CPC may appear to be in conflict with each other. So would the illustrations to both the sections appear to be. I shall attempt to show that they are not. It is a fundamental rule of statutory interpretation that all sections in a statute must, as far as possible, be given a meaning. The provisions of an Act must be construed in a way '... that produces the greatest harmony and the least inconsistency' (see *Australian Alliance Assurance Co Ltd v Attorney General (Qld)* (1916) St R Qd 135). As Pearce and Geddes said in their book entitled *Statutory Interpretation in Australia* (4th Ed) at p 110:

> The overriding idea is that an Act should be read as a whole and this has the effect of making all provisions subject to one another.

The cases that I have cited earlier on the need to particularize the deception practised did not consider the effect of s 156 of the CPC except for the case of *Liew Min Poh v PP* (1962) 3 MC 316 where Azmi J (as he then was) having referred to that section and its illustration (b) preferred to follow *Tan Peng Ann v PP* [1949] MLJ Supp 10 where s 156 of the CPC was not argued. In my opinion an analytical reading of both the sections reveal that they are in harmony with each other. They have their own separate and distinct roles to play in the CPC and, as a matter of fact, complement each other and are not in conflict. Section 154 is a general provision while s 156 serves to qualify it. Section 154 will render a charge defective if an objection to its non-compliance is taken before the commencement of the trial while s 156 will not invalidate such a charge if the objection is taken during or at the conclusion of the trial in the circumstances mentioned in the section. This becomes apparent when it is realized that the object of s 154 is, firstly, to ensure that the accused has sufficient notice of the matter with which he is charged as otherwise he will be seriously prejudiced in his defence and, secondly, to enable the court to keep in view the real points in issue and to confine the evidence to such matters. This as of necessity means, in the light of the explicit provisions of s 156, that the requirements of s 154 arise for consideration before the commencement of the trial with appropriate amendments, if necessary. In this regard I refer to *PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63 where Mohamed Azmi J (as he then was) in commenting on this section said at p 66:

> ... the charge must give such particulars as are necessary to enable the accused to prepare his defence or give proper instructions to his counsel *before trial.* (Emphasis added).

On the other hand the words in s 156 '... at any stage of the case ...' and '... unless the accused was in fact misled by such error or omission ...' show that this section is activated after the commencement of the trial. This is obvious as the question of the accused being misled or not will only arise at that stage. The section states in unmistakable terms that if the accused has not been misled such error or omission to state the offence or the particulars required shall not be regarded as material. The fact that the accused has not been misled despite the defect in the charge amounts to the objects of s 154 being satisfied. It follows that the object of s 156 is to

ensure that technical defects in the charge should not be allowed to defeat the ends of justice. In considering the application and object of this section the 2 *AIR Commentaries on The Code of Criminal Procedure* (1973) says at pp 594–594:

> It is for the court to decide in each case whether the defect in a charge has misled the accused. The question of prejudice to the accused is ultimately one of inference from all the facts and circumstances of the case. The court will be slow to entertain the question of prejudice when the details are not furnished. In considering the question of whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage of the proceedings.
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> The section is aimed, among other things, at objections on the ground of variance between the charge and the evidence. But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence and, therefore, where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on on such basis, it is not thereafter open to the prosecution to contend that the charge means something else. The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice.

The corollary is that a conviction cannot be set aside unless the accused has been misled by the omission of an essential ingredient in the charge as the section is in mandatory terms (see *Low Seng Wah v PP* [1962] MLJ 107). The burden is on the accused to establish that he was misled by the error or omission. As Neal J said in *Low Seng Wah v PP* [1962] MLJ 107 in considering s 156 of the Code, at p 109:

> It appears to me, therefore, that to succeed on this appeal the appellant must established two things. Firstly, that an essential ingredient of the offence was omitted from the charge and secondly, he was misled by that omission.

On the application of s 156 to a charge for cheating I refer to the Indian Supreme Court case of *Damodaran v The State of Travancore-Cochin* AIR 1953 SC 462 where the charges under s 420 of the PC as framed were vague in that they did not specify the manner and mode in which the cheating had been done. The court held that the defect in the charges amounted to an irregularity which had not materially prejudiced the accused. Similarly in *Billinghurst & Ors v King Emperor* AIR 1924 Cal 18 it was held at p 41, that the omission to specify certain particulars in a charge for cheating:

> ... should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the abovenamed particulars from the charge.

In this appeal there was nothing to suggest that the accused had been misled. No objection had been taken to the defect in the charge by the accused either at the commencement or in the course of the trial. On the contrary his case falls squarely within the parameters of illustration (b) of s 156 of the CPC. Though the particulars of the deception have not been

set out in the charge the accused defended himself and gave his own account of the transaction. There was clear evidence that he claimed to be a police officer and that he could settle the khalwat offence in respect of which the complainant was caught. The complainant was carefully cross-examined on these issues by learned counsel for the defence and it cannot be said that the accused was prejudiced by the defect in the charge. In the circumstances the omission to set out the particulars of the deception in the charge cannot be said to be material to warrant a ruling that the charge is defective. I pause to add that defects in the charge as in the appeal before me ought to have been rectified by the trial court (see *Lew Cheok Hin v R* [1956] MLJ 131).

In the upshot I quashed the conviction and sentence imposed by the learned magistrate and ordered that the accused be acquitted and discharged. I also ordered that the fine paid by him be refunded.

Appeal allowed and accused acquitted.

Reported by Kenneth Goh